NO. 73-643

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

BOURNS, INC. and MARLAN E. BOURNS,

Petitioners,

v.

ALLEN-BRADLEY COMPANY, BECKMAN INSTRUMENTS, INC., THE BUNKER-RAMO CORPORATION, FAIRCHILD CAMERA & INSTRUMENT CORP., TRW INC. and WESTON INSTRUMENTS, INC., on behalf of themselves and as representatives of others similarly situated,

Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents' opposing brief really does not respond to the petition. It represents simply another approach to the question which is obviously the only concern of respondents, both here and in their own cross-petition (No. 73-644): Whether the court below was right or wrong on the facts of this particular case. Respondents insist that the issue is whether the Seventh Circuit was right in applying the rule of *Blonder-Tongue*[1] retroactively. But if that were the

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[1] *Blonder-Tongue Labs., Inc.* v. *University of Illinois Found.*, 402 U.S. 313 (1971).

issue, it is doubtful that petitioners would now be before this Court.

Rather, the important question presented here is whether this Court's silence on the matter of retrospectivity versus prospectivity is to be taken as a directive for retroactive application of a new rule of law. This question transcends the law of patents and collateral estoppel, and has a far broader significance than merely inquiring whether *Blonder-Tongue* is to be applied retroactively. Yet respondents do not have a thing to say about this question. They do not deny its importance. They do not deny that it is likely to be encountered with some frequency in the future. And most significantly, they do not deny that it fairly states the position of the majority of the court below: That this Court's failure to rule prospectively in *Blonder-Tongue* must mean that *Blonder-Tongue* is to be applied retroactively.

In arguing the merits of the holding of the Court of Appeals, respondents urge among other things that the *Chevron*[2] criteria for non-retroactive application are not satisfied by the facts of this case. In particular, they argue that the *Blonder-Tongue* rule was foreshadowed by a general erosion of confidence in *Triplett* v. *Lowell*, 297 U.S. 638 (1936). This is simply not so. In the thirty-five years between *Triplett* and *Blonder-Tongue*, not a single Court of Appeals decision deviated from strict adherence to the

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[2] *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

Triplett rule.[3] This unwavering obedience to established law persisted through the Seventh Circuit's decision in *Blonder-Tongue* itself.[4]

Respondents, in their opposition and in their own cross-petition, have said nothing to alter the fact that the question presented by this petition is an important one which merits the attention of this Court.

Respectfully submitted,

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[3] E.g. *Nickerson* v. *Kutschera*, 419 F.2d 983 (3d Cir. 1969); *Nickerson* v. *Kutschera*, 390 F.2d 812 (3d Cir. 1968); *Technograph Printed Circuits, Ltd.* v. *United States*, 372 F.2d 969 (Ct. Cl. 1967); *Technograph Printed Circuits, Ltd.* v. *Methode Electronics, Inc.*, 356 F.2d 442 (7th Cir. 1966); *Tatko Bros. Slate Co.* v. *Hannon*, 270 F.2d 571 (2d Cir. 1959); *Aghnides* v. *Holden*, 226 F.2d 949 (7th Cir. 1955). See also *Tri-Wall Containers, Inc.* v. *Continental Can Co.*, 323 F. Supp. 700 (S.D.N.Y. 1971); *Agrashell, Inc.* v. *Bernard Sirotta Co.*, 281 F. Supp. 704 (E.D.N.Y. 1968). *But see Nickerson* v. *Pep Boys*, 247 F. Supp. 221 (D. Del. 1965).

[4] *University of Illinois Found.* v. *Blonder-Tongue Labs, Inc.*, 422 F.2d 769 (7th Cir. 1970).